IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

DONALD N. GILBERT, HAROLD C. YEAGER and GEORGE A. CAREY, constituting the First Mortgage Bondholders' Protective Committee for The Peoria and Eastern Railway Company's First Consolidated Mortgage 4% Bonds due April 1, 1940,

Petitioners,

against

THE PEORIA AND EASTERN RAILWAY COMPANY and WILLIAM CARNEGIE EWEN, LEWIS L. CLARKE and MAURICE D. ADAMS, as the Peoria and Eastern Railway Company Income Bondholders' Protective Committee,

Respondents.

MOTION TO DISPENSE WITH PRINTING AND SERVICE OF PORTIONS OF RECORD AND FOR THE PRINTING OF A JOINT RECORD

Counsel for petitioners in this case filed herewith their petition for a writ of certiorari to the United States District Court for the Southern District of New York, accompanied by a certified copy of the record of the proceedings in said District Court. Contemporaneously therewith counsel for the Income Mortgage Bondholders Protective Committee also filed a petition for a writ of certiorari together with a similar motion.

1. The nature of this case and the questions presented have been set forth in the foregoing petition for a writ of certiorari.

2. The said petition for a writ of certiorari does not request consideration by this Court of all the questions passed upon by the District Court. Many of the facts contained in the testimony and exhibits pertinent to the issues raised by said petition are succinctly set forth in the District Court's findings. Many of the exhibits were introduced so that reference could be made to only parts thereof. Petitioners now seek to be relieved of printing those parts of the record of proceedings below which are not necessary to a consideration of the questions presented by the petition for a writ of certiorari herein or which are contained in the uncontested findings of the lower court.

3. It is respectfully submitted that it would serve no purposes to have printed portions of the record below which pertain only to issues raised in the District Court but not raised herein.

4. The District Court made fifty-three findings giving the detailed history and present status of Peoria. Petitioners contest none of these findings except Findings Nos. 43-48 inclusive and No. 52, which are the conclusions of the District Court and do not purport to be findings of fact. Therefore, petitioners deem it unnecessary to print such portions of the proceedings and exhibits below as are contained in the uncontested findings of the District Court.

5. An effort was made to stipulate with counsel for Peoria & Eastern Railway Co. as to what parts of the record should be printed for submission to this Court. Annexed hereto and made a part hereof as if fully set forth herein are the letter of August 30, 1940 to the respondent Peoria pertaining thereto, and the letter of September 3,

1940 in reply thereto, respectively marked Exhibits A and B. Thereafter several conversations were had and it became apparent that no stipulation for curtailment of the record could be agreed upon. Counsel for Peoria and Eastern claim that with the exception of minor deletions, it was necessary to print the entire record of the proceedings below upon the ground that the detailed provisions of Chapter 15 of the Bankruptcy Act make it necessary to print so much of the record as is relevant to the specific findings required by the Act. Petitioners claim that since the formal jurisdictional requirements are contained in those of the lower court's findings which are not contested by petitioners, it is unnecessary to print the testimony upon which these findings were based.

6. If the entire record of the proceedings below were to be printed, the record before this Court would comprise approximately 2,000 printed pages, including 376 pages of testimony and 80 exhibits, some of which are extremely voluminous. The major portion of such a record would be entirely irrelevant to this appeal and would not be referred to by the parties or the Court, and would result in an overburdensome printing bill for petitioners.

7. The following constitute what the petitioners in conjunction with the Income Mortgage Bondholders Protective Committee believe are the papers necessary to be included in the record:

(1) Petition of Peoria and Eastern Railway Company.

(2) The Plan of Adjustment contained in Exhibit 5, omitting therefrom all material following page 28, all of which latter material is contained in other exhibits hereinafter listed, except the agreement evidencing extension of the First Consolidated Mortgage Bonds, which is obviously unnecessary.

(3) Exhibit 20 (First Consolidated Mortgage).

(4) Exhibit 23 (Income Mortgage Indenture).

(5) Exhibit 26 (Operating Agreement).

(6) Exhibit 27 (Supplement to Operating Agreement).

(7) Exhibit 29 (ICC decision).

(8) Exhibit 30 (ICC decision).

(9) Exhibit 33 (Agreement evidencing Extension of Operating Agreement).

(10) Exhibit 33½ (Result of Operations—1930-1939).

(11) Exhibit 34 (Profit and Loss Statement—1930-1939).

(12) Exhibit 35 (General Balance Sheet—1930-1939).

(13) Exhibit 36 (Summary of Expenditures).

(14) Exhibit 37 (Constructed Balance Sheet after disposition of the proceeds from the Purchase Money Lien).

(15) Exhibit 40 (Valuation to December 31, 1939).

(16) Exhibit 41 (Estimated Income for Next Five Years).

(17) Exhibit 46 (Letter of Transmittal of $5,000,000).

(18) Exhibit 49 (Letter from Big Four to Peoria and Eastern of election to extend Operating Agreement).

(19) Exhibits D, E and F (Directors and Officers of Peoria and Eastern, N. Y. Central and Big Four).

(20) Exhibit I (Analysis of Debt due Big Four and New York Central by Peoria and Eastern).

(21) Exhibit O (the first page only of the minutes pertaining to the statement of the president of the Big Four with respect to the leasing of the Peoria properties).

(22) The first three pages of Exhibit S containing the agreement between Big Four and the reorganization committee of the O. I. & W. Ry. Co.

(23) Exhibit Y (Letter of W. C. Ewen).

(24) Exhibit GG (Letter of Harold C. Yeager to Central Hanover Bank dated March 22, 1940).

(25) Direct testimony of Joseph A. Keegan, General Freight Agent of N. Y. Central.

(26) Stipulation respecting value of Springfield Division.

(27) The opinion of the Court.

(28) The Court's findings of fact and conclusions of law.

(29) Decree of the Court.

The Income Mortgage Bondholders are contemporaneously submitting to this Court a petition for a writ of certiorari and a motion for leave to delete the record, and it is respectfully requested that the Court refer to both motions at the same time.

WHEREFORE, it is prayed that (a) the printing and service of any portions of the record on appeal, except those items hereinabove in paragraph 7 enumerated, be dispensed with, and (b) the First Consolidated Mortgage Bondholders and the Income Mortgage Bondholders be allowed to print only one record jointly.

Dated, New York, N. Y., September 26, 1940.

Respectfully submitted,

DONALD N. GILBERT, HAROLD C. YEAGER and GEORGE A. CAREY, Petitioners,
By SCRIBNER & MILLER,
ALFRED E. SMITH, JR.,
Solicitors of Petitioners.

MARK HYMAN,
Counsel for Petitioners.

Exhibit A

COPY

August 30, 1940.

re *Peoria and Eastern Railway*

Jacob Aronson, Esq.
Crosby J. Beakes, Esq.
466 Lexington Avenue
New York, N. Y.

Dear Sirs:

Preparations are being made by the First Consolidated Bondholders' Protective Committee and the Income Bondholders' Protective Committee of the Peoria and Eastern Railway Company to apply to the United States Supreme Court for writs of certiorari to the Special District Court to review the decree entered in the above entitled proceeding.

Although separate writs of certiorari will be presented, the Committees are collaborating on the preparation of one record for the sake of brevity and convenience. In conformity with the rules of the United States Supreme Court with respect to printing only such portions of the testimony and exhibits pertinent to the issues to be presented to the Court, we believe that the following should constitute the record on appeal:

1. Petition of Peoria and Eastern Railway Company.

2. The Plan of Adjustment contained in Exhibit 5, omitting therefrom all material following page 28.

3. Extracts from Exhibit 20 (First Mortgage Indenture) pertaining to the description of the property covered by the Indenture and pertaining to the exchange of First Consolidated bonds for prior lien bonds.

Exhibit A.

4. That portion of paragraph Sixth of Exhibit 23 (Income Mortgage Indenture) as is contained on page 14 of the Income Mortgage, and last paragraph on page 6.

5. Exhibit 26 (Operating Agreement).

6. Exhibit 27 (Supplement to Operating Agreement).

7. Exhibit 29 (ICC decision).

8. Exhibit 30 (ICC decision).

9. Exhibit 33 (Agreement evidencing Extension of Operating Agreement).

10. Exhibit 33½ (Result of Operations—1930-1939).

11. Exhibit 34 (Profit and Loss Statement—1930-1939).

12. Exhibit 35 (General Balance Sheet—1930-1939).

13. Exhibit 36 (Summary of Expenditures).

14. Exhibit 37 (Constructed Balance Sheet after disposition of the proceeds from the Purchase Money Lien).

15. Exhibit 40 (Valuation to December 31, 1939).

16. Exhibit 41 (Estimated Income for Next Five Years).

17. Exhibit 46 (Letter of Big Four to Central Hanover Bank).

18. Exhibit 49 (Letter from Big Four to Peoria and Eastern of election to extend Operating Agreement).

19. Exhibit I (Analysis of Debt due Big Four and New York Central by Peoria and Eastern).

20. Exhibit O (That portion of the minutes pertaining to the statement of the president of the Big Four with respect to the leasing of the Peoria properties).

Exhibit A.

21. That portion of Exhibit S containing the agreement between Big Four and the reorganization committee of the O. I. & W.

22. Exhibit FF (Letter to Central Hanover Bank re $500,000 O. I. & W. bonds).

23. Exhibit 50 (Letter to Central Hanover Bank enclosed with Exhibit FF).

24. Exhibit GG (Letter of Harold C. Yeager to Central Hanover Bank dated March 22, 1940.)

25. Stipulation respecting value of Springfield Division.

26. The opinion of the Court.

27. The Court's findings of fact and conclusions of law.

28. Decree of the Court.

We shall be pleased to confer with you at your earliest possible convenience regarding any suggestions which you may have with respect to such additions to this record as you may see fit, so that we may enter into a stipulation agreeing upon the contents of the record.

Very truly yours,

SCRIBNER & MILLER,
ALFRED E. SMITH, JR.,
Attorneys for First Mortgage Bondholders' Protective Committee.
By JULIUS J. ROSENBERG.

CHARLES S. ARONSTAM,
Attorney for Income Mortgage Bondholders' Committee.
By ARCHIE S. KARP.

By Hand.

Exhibit B.

NEW YORK CENTRAL SYSTEM

JACOB ARONSON
Vice President, Law

466 LEXINGTON AVENUE
NEW YORK

September 3, 1940.

Messrs. Scribner & Miller,
Alfred E. Smith, Jr.,
Attys. for First Mtge. Bondholders' Protective Committee,
20 Exchange Place, New York, N. Y.

Mr. Charles S. Aronstam,
Atty. for Income Mortgage Bondholders, Committee,
50 Broadway, New York, N. Y.

Dear Sirs:

This will acknowledge your communication dated August 30th with reference to the Peoria & Eastern Railway Company proceeding.

In view of the detailed provisions of Chapter XV of the Bankruptcy Act under which this proceeding was had, it seems to us necessary that there be printed so much of the record as is relevant to the specific findings required by the Act. This seems particularly necessary in such a proceeding as this, where the statute calls for detailed proofs and specific findings regardless of the extent of acceptances of the plan or of any lack of opposition thereto. This will require the printing of the petition with its schedules, the several court orders, the applications for intervention and orders in respect thereof, testimony of witnesses, the petitioner's exhibits, the opinion of the court, the findings and decree. Of course, it is not intended that there shall not be included such of the intervenors' exhibits as you may desire. It is recognized that some of the exhibits are, for purposes of printing, susceptible of abbreviation and we are prepared to cooperate with you in that regard.

Awaiting your further advice, we are

Very truly yours,

JACOB ARONSON.

d

Office - Supreme Court, U. S.
FILED
OCT 23 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 466.

DONALD N. GILBERT, HAROLD C. YEAGER and GEORGE A. CAREY, constituting the First Mortgage Bondholders' Protective Committee for The Peoria and Eastern Railway Company's First Consolidated Mortgage 4% Bonds due April 1, 1940,

Petitioners,

against

THE PEORIA AND EASTERN RAILWAY COMPANY and WILLIAM CARNEGIE EWEN, LEWIS L. CLARKE and MAURICE D. ADAMS, as the Peoria and Eastern Railway Company Income Bondholders' Protective Committee,

Respondents.

REPLY MEMORANDUM FOR PETITIONERS AND ANSWER TO REPLY OF RESPONDENT, THE PEORIA AND EASTERN RAILWAY COMPANY, TO PETITIONERS' MOTION FOR DIMINUTION OF RECORD.

DONALD N. GILBERT, HAROLD C. YEAGER and GEORGE A. CAREY, Petitioners,
By SCRIBNER & MILLER,
ALFRED E. SMITH, JR.,
Solicitors of Petitioners.

MARK HYMAN,
Counsel for Petitioners.

IN THE

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THE PEORIA AND EASTERN RAILWAY COMPANY and WILLIAM CARNEGIE EWEN, LEWIS L. CLARKE and MAURICE D. ADAMS, as the Peoria and Eastern Railway Company Income Bondholders' Protective Committee,

Respondents.

REPLY MEMORANDUM FOR PETITIONERS

The questions presented, the assignments of error and the reasons for the allowance of the writ, divide into three main categories:

I

From the indicated minimum net operating revenue of $304,727, the first mortgage interest absorbs $188,892 and the junior creditor-stockholder absorbs on its claim the balance of $115,835 and all additional sums expected with

improved railroad earnings. The outstanding first mortgage bonds matured on April 1, 1940. If the company was unable to pay the same, it should at least appropriate thereto the expected net earnings of the property, and not force the bondholders to leave their capital in the business for twenty years while the parent corporation receives interest and principal upon its subordinate claim. This contravenes the rules established in "the Boyd case, its antecedents and its successors", as announced in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 118.

The respondent argues (p. 18) that this line of cases applies only to a reorganization and not to "an adjustment such as is here under consideration". This argument overlooks the statute itself, which reads (§725 (3)):

> "that the plan * * * is fair and equitable as an adjustment, affords due recognition of the rights of each class of creditors and stockholders and fair consideration to each class thereof adversely affected, and will conform to the law of the land regarding the participation of the various classes of creditors and stockholders".

"The law of the land regarding the participation of various classes of creditors and stockholders" is the *Boyd* line of cases. Congressional recognition of this is shown by the following quotations in connection with the introduction of the Railroad Adjustments Act:

> "The bill provides that the plan must conform to the requirements of the law of the land with reference to the participation of stockholders and creditors, and this provision, where used in section 77, has been interpreted to require that the plan must conform to the principles of *Northern Pacific Railway Co.* v. *Boyd,* 228 U. S. 482." (Report of the House Committee on the Judiciary dated March 31, 1939, to accompany H. R. 5407.)
>
> "It is not the intention of these amendments to make inapplicable the principles of *Northern Pacific*

Railway Co. v. *Boyd* (228 U. S. 482)." (Report of the Senate Committee on Interstate Commerce dated May 24, 1939, to accompany H. R. 5407.)

The mortgage priority upon the road and its earnings is completely dislocated by the plan, which gives an actual priority of payment to the subordinate creditor-stockholder, leaving the bondholders to wait twenty years for their payment. This dislocation is equally apparent, by whatever name we call it: whether reorganization, rearrangement, or adjustment. The *Monon* case applies this principle to any new arrangement of the debt.

> "This is based upon the familiar rule that the stockholders' interest in the property is subordinate to the rights of creditors; first, of secured, and then of unsecured creditors, and *any arrangement of the parties* by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation" (*Louisville Trust Co.* v. *Louisville &c. Ry.*, 174 U. S. 674, 684).

The plan is also in direct contravention of *Case* v. *Los Angeles Lumber Company, supra,* because of the absence of any showing of an equity beyond the First Consolidated Bonds. Without an appraisal, the Court below could not exercise "an informed, independent judgment" as to whether any equity existed, as a condition prerequisite to confirmation (*National Surety Co.* v. *Coriell,* 289 U. S. 426, 436, relied upon in the Los Angeles Lumber Company case; *First National Bank* v. *Flershem,* 290 U. S. 504, 525-526; *In re Philadelphia and Reading Coal & Iron Co.,* 105 Fed. (2) 256, 357-358).

Obviously, the Interstate Commerce valuation for rate-making purposes of $12,337,133, is no measure of fair or actual value, unless supported by earnings. The recognized and most realistic basis of valuation in a railroad reorganization is the capitalized earning power of the road

(Bonbright on "Valuation of Property", Vol. II, pp. 880-881; *In re Chicago, Great Western Railway Co.*, 29 Fed. Supp. 149, 159; *Chicago & N. W. Ry. Co.* v. *Eveland*, 13 Fed. (2) 442).

The average earnings of Peoria & Eastern for the past ten years were $170,301, which is 1⅜% upon the rate-making valuation of I.C.C.; clearly indicating that the rate-making valuation is scarcely even evidentiary of true value. In other words, the respondent would multiply the annual earnings by 72 in order to get true value; whereas, even in the height of the boom days, security values did not exceed 15 to 25 times annual earnings.

Probably 20 times earnings is the most favorable to the railroads that anybody could estimate, which would give a valuation of $3,406,020. In order to produce a value even equal to the $4,722,300 of outstanding first consolidated bonds, one would have to multiply the average annual earnings more than 27 times; and in order to get even a slim value on the common stock remaining outstanding, we would have to multiply average earnings 72 times to produce any true value to support the plan. Such figures are astronomic, have no realism, and have no evidence or finding to support any value beyond the First Consolidated Bonds.

II

The charge is that Peoria & Eastern was the mere instrumentality of Big Four and New York Central, that the parent corporations used their dominating position to divert assets and earnings, and that until, after a proper accounting, restitution is made, these parent corporations are not in equity entitled to the large benefits they received under the Adjustment Plan.

The Operating Agreement of 1890 provided that the parent corporation

> "at its own cost and expense shall and will keep up and maintain * * * all said rolling stock and equipment in good working order, and restore and renew all parts thereof as may be necessary to that end".

Said obligation was assigned to the Mortgage Trustee as additional security for the First Consolidated Mortgage Bonds. The parent corporation disregarded said obligation by permitting 400 cars originally costing $515,000 to be retired and not restored. Peoria & Eastern's brief (p. 15) concedes this. This wasted and diverted the mortgage security to the damage of $106,000 annually in excessive per diem rentals.

Peoria & Eastern's brief rationalizes by claiming, first, that New York Central kept its books in accordance with Interstate Commerce regulations (Brief, pp. 14-15), which claim, if true, is wholly irrelevant; and, secondly, that New York Central does not owe the amount in the "equipment retirement account", but that it merely "affords an accounting measure" to represent the equipment which the parent corporation must turn over to Peoria & Eastern upon the termination of the Operating Agreement (Respondent's Brief, p. 22). They say that "the retirement account does not represent an amount now due" (id. p. 22). This claim is not consistent with Paragraph First of the Operating Agreement, that the parent company "*at all times* * * * at its own cost and expense shall and will keep up and maintain * * * all said rolling stock and equipment in good order and restore and renew all parts thereof as may be necessary to that end".

Nor is the statement that the New York Central does not owe the money consistent with the record, as follows:

> "7. * * * and the New York Central, as lessee from the Big Four, is holding for the benefit of the Peoria and Eastern $513,431.65 in an equipment retirement account and $768,710.44 in an equipment depreciation account" (Plan, p. 18).

Mr. Clancy's testimony states the matter simply.

> "Q. Mr. Clancy, you are the Assistant Comptroller of the New York Central and of the Big Four and of the Peoria and Eastern? A. I am" (Minutes, p. 83).
>
> "Q. So far as the equipment retirement account of $514,000 and the equipment depreciation account of $768,000 are concerned, are these accounts carried by the New York Central? A. As liabilities to the Peoria and Eastern.
>
> Q. In other words, the New York Central owes that money to the Peoria and Eastern? A. Correct" (Minutes, p. 236).

Regarding the Equipment Depreciation Account of $768,000, that was a deduction from the gross earnings of Peoria & Eastern as part of its operating cost and should have been kept as security by it or by the Mortgage Trustee to whom the operating agreement had been assigned. Instead it was set up as an unsecured claim against New York Central, although it is the product of the mortgaged rolling stock. Peoria & Eastern's brief admits (p. 15) that this is set up "on account of the loss of service life of equipment still in existence".

Regarding the Betterment Account of $1,806,493 charged against Peoria & Eastern, the Operating Agreement requires the New York Central to supply reasonable betterments at its own cost and expense, and the Supplement to the Operating Agreement provides that no advances should be chargeable against the First Consolidated Mortgage or its bondholders.

It is conceded in the respondent's brief (p. 16) that the 6% on the Retirement and Equipment Accounts, which upon the record were debts unconditionally due, were offset by New York Central against interest on the advances which were payable only out of profits—of which, except in one year, there were none.

The diversion of $1,121,000 of the pledged Springfield lien from the Trustee for the First Consolidated Bondholders, the pledgee, to pay other debts and obligations of Peoria & Eastern receives no explanation in the respondent's brief.

The basic authorities upon the Instrumentality Rule and the effect of inequitable conduct of a parent corporation as precluding it from receiving the equitable benefits of a reorganization, are set forth in our petition and have received no specific reply.

III

Here, the charge is that although the Railroad Adjustments Act authorizes only temporary adjustments of overdue debts, fundamental changes were made, involving: a twenty-year extension of the mortgage debt; a keeping alive, as a charge against future earnings, the parent corporation's past operating losses, which, in any event, were not to be charged against the First Mortgage Consolidated Bondholders or their security; and the permanent wiping out for the future the "Supplement to Operating Agreement" which precludes similar charges against the First Consolidated Mortgage Bondholders, thereafter accruing.

Against this, the respondent apparently concedes that this is no temporary adjustment, but argues that Chapter 15 of the Bankruptcy Act is not a mere moratorium statute and is not limited to a requirement that the postponement of maturities must be temporary only.

We must consider Chapter 15 in the light of the fact that there exists Chapter 77 for making permanent adjustments in railroad securities. We must also consider the simple language of §710 (2) (b):

> "that such corporation's inability to meet its debts, matured or about to mature, is reasonably expected to be temporary only."

Inability to meet its matured debt is to be temporary only—what can that mean except that there must be an inability to meet its debt with a delay that is temporary only? What can that mean except that the plan must be proposed to meet the matured debt with a delay that is temporary only? How does the corporation show an ability to meet its overdue mortgage debt within such temporary period if it postpones the debt without interim payments for twenty years and makes other fundamental changes in the security. According to the Report of the House Committee on Judiciary (p. 4), Chapter 15 is applicable where the Company "is in need of temporary relief only."

This Court denied certiorari in two cases under Chapter 15: *Goetz* v. *Baltimore & Ohio R. Co.*, 309 U. S. 654, and *Steelman* v. *Wichita Falls & S. R. Co.*, 309 U. S. 687. Respondent cites these cases (p. 3) as though they might have bearing either upon the interpretation of Chapter 15 or upon the inequities of the plan. But these cases presented only the narrow question of whether assents obtained before the filing of the petition could be counted in making up the required percentage of assents. This question under Section 77B had already been decided in the affirmative in *Campbell* v. *Allegheny Corp.* (75 Fed. 2d 947, cert. denied 296 U. S. 581), and did not involve any question of public interest.

The respondent argues also that provision for a sinking fund out of earnings would impair the obligation of the junior income bonds. If so, this emphasizes the need of a complete reorganization under Section 77, because, obviously, the right of the senior bondholders to a lien upon the earnings to meet their overdue debt, cannot be impaired by any provision in a junior lien.

However, no such point was urged by the income bondholders. Indeed, the parent corporation is arguing the case of the junior lienors, forgetting that its claim to its

advances, past and future, plus interest thereon, is wedged between the senior and junior lien and pipes off all the earnings over simple interest on the first mortgage debt.

Nor must it be overlooked that $1,121,000 of the pledged Springfield lien is diverted from the purpose of the pledge and utilized to satisfy obligations other than those specified in the pledge. No more fundamental or permanent impairment of a mortgage lien can be imagined than diverting part thereof to pay other creditors. And may a Federal Court validate such expropriation as a temporary adjustment?

It is respectfully submitted that the Writ of Certiorari should be granted.

Dated: New York, N. Y., October 22, 1940.

DONALD N. GILBERT, HAROLD C. YEAGER,
and GEORGE A. CAREY, Petitioners,
By SCRIBNER & MILLER,
ALFRED E. SMITH, JR.,
Solicitors of Petitioners.

MARK HYMAN,
Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 466.

DONALD N. GILBERT, HAROLD C. YEAGER, and GEORGE A. CAREY, constituting the First Mortgage Bondholders' Protective Committee for The Peoria and Eastern Railway Company's First Consolidated Mortgage 4% Bonds due April 1, 1940,

Petitioners,

against

THE PEORIA AND EASTERN RAILWAY COMPANY and WILLIAM CARNEGIE EWEN, LEWIS L. CLARKE and MAURICE D. ADAMS, as the Peoria and Eastern Railway Company Income Bondholders' Protective Committee,

Respondents.

ANSWER TO REPLY OF RESPONDENT, THE PEORIA AND EASTERN RAILWAY COMPANY, TO PETITIONERS' MOTION FOR DIMINUTION OF RECORD.

Petitioners agree to the printing of the following exhibits requested by said respondent:

Exhibit 4—Excerpt from Minutes of Special Meeting of Stockholders of Peoria & Eastern;

Exhibit 24—Supplement to the Income Bondholders' Indenture;

Exhibit V—Memorandum of Settlement; and

Exhibit X—Statement of Re-Audits; but petitioners believe that to complete the last two exhibits Exhibit W must also be printed, and therefore respectfully request its inclusion in the printed record.

Petitioners also agree to the printing of the Minutes enumerated by Peoria & Eastern, but to complete the matter therein included, the minutes of Mr. Place's testimony should commence with the last question on page 136 instead of at page 140, and the minutes of Mr. Clancy's testimony should include the questions and answers found at pages 83 and 236 of the Minutes, as set forth in the within Reply Memorandum for Petitioners.

Petitioners respectfully object to the printing of the following exhibits requested by Peoria & Eastern, for the following specified reasons:

Exhibits 18 and 19—

For the reason that these two deeds are fully summarized in the Special Court's findings numbered 6 and 7.

Exhibits K to Q—

These are excerpts from minutes of meetings of Board of Directors of Big Four in 1889 and 1890. The essence of these minutes is contained in the 1889 Reorganization Agreement which is the first three pages of Exhibit S, already to be included in the record.

Part of Exhibit S—

This deals with the distribution of the securities to have been issued in 1890 by Peoria & Eastern, and has no relevancy on the issues presented, as no objection has been made to this distribution. In addition, the actual distribution and history

of the bond issues of Peoria & Eastern are fully set forth in the Special Court's findings numbered 1 to 17.

Exhibit 51—

This exhibit consists of twenty lengthy financial statements of Peoria & Eastern submitted to Central Hanover Bank & Trust Company as Trustee for the Income Bondholders, for each year from 1920 to 1939 inclusive. The statements of the last ten years are reflected in Exhibit 35, already to be included in the record. The only purpose stated by respondent for including these twenty statements is to evidence the fact that annual accounts were filed by Peoria & Eastern pursuant to the requirements of the Income Bondholders' Indenture. This fact is in no wise contested, and in any event is proved by the testimony of the witness Harrigan (Minutes, p. 256), which the respondent proposes to include in the record and to which inclusion petitioners have no objection.

Therefore, in addition to the papers to be included in the record as enumerated in petitioner's motion, there should also be included the following portions of the record:

Exhibit 4—

Excerpt from Minutes of Special Meeting of Stockholders of Peoria & Eastern, approving Plan of Adjustment;

Exhibit 24—

Supplement to Income Mortgage Indenture;

Exhibit V—

Memorandum of Settlement;

Exhibit W—

Big Four's Statement of Income and Deductions from Income for Year 1919;

Exhibit X—

Statement of Re-Audits;

Testimony:

Witness Harrigan, Minutes, p. 256; Witness Voorhees, Minutes, pp. 118-129; Witness Place, Minutes, last question on page 136 to middle of page 146; Witness Clancy, Minutes, last line of pages 208 and 209, and the aforementioned parts on pages 83 and 236.

The Income Bondholders' Committee (No. 467) joins in this answer. Respondent, Peoria & Eastern, has made no objection to the printing of a joint record.

Dated: New York, N. Y., October 22, 1940.

Respectfully submitted,

DONALD N. GILBERT, HAROLD C. YEAGER,
and GEORGE A. CAREY, Petitioners,
By SCRIBNER & MILLER,
ALFRED E. SMITH, JR.,
Solicitors of Petitioners.

MARK HYMAN,
Counsel for Petitioners.